IOI Loders Croklaan Oils Sdn Bhd v LK Freight Services (M) Sdn Bhd & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–637 OF 2007
SUPANG LIAN JC
15 MAY 2011

Civil Procedure — Unless order — Failure to comply — Unless order to file documents issued following second defendant's repeated failures to obey previous orders — Unless order not obeyed — Judgment entered — Application to set aside judgment — Whether reason for non-compliance sufficiently explained — Whether failure to obey was beyond defendant's control — Whether showing of defence on merits relevant to setting aside judgment

The second defendant had repeatedly failed to obey the orders of the deputy registrar ('DR') issued at pre-trial case management ('PTCM') conferences to file the necessary documents in preparation for the trial. Ultimately, the DR ordered all parties to appear before the trial judge for case management ('CM') and issued an 'unless' order that if the second defendant failed to attend before the judge on the CM date or failed by that date to comply with the orders given at previous PTCM meetings, judgment would then be entered against the second defendant. On the appointed CM date, counsel for the plaintiff and the first defendant informed the judge that the second defendants' counsel would be delayed. Although the matter was stood down for a reasonable time, the second defendants' counsel failed to attend. The court granted the plaintiff application for judgment to be entered against the second defendant for his failure to comply with the 'unless' order. The second defendant subsequently applied for the judgment to be set aside but it was refused.

Held, dismissing the second defendant's application:

(1) Resort to the peremptory order in the face of repeated disobedience of the second defendant to the court orders to file the documents in preparation for trial was inevitable and well justified. The second defendant had pushed it to the limit when he, no less than five times, persisted in disobeying the DR's orders to file the documents (see para 11).

(2) It would defeat the cause of justice if the second defendant was allowed to escape the consequences of judgment given against him. His failure to comply was not something that was beyond his control (see para 30).

(3) The second defendant had contrived the situation. It was brought about by his insistence in the closing moments of the pre-trial process, for no

reason whatsoever, to appoint new solicitors, and, by that, unreasonably presuming to be excused from complying with the court orders to the extent of instructing his solicitors not to file the documents (see para 30).

(4) The concept or test of defence on the merits did not come into play here. The test applicable was for the defaulting party to demonstrate both that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances (see para 28).

[Bahasa Malaysia summary

Defendan kedua telah berulangkali gagal untuk mematuhi perintah-perintah timbalan pendaftar ('TR') yang diberikan ketika persidangan pra-perbicaraan pengurusan kes ('PPPK') untuk memfailkan dokumen-dokumen yang perlu sebagai persediaan untuk perbicaraan. Khususnya, TR memerintahkan kesemua pihak untuk hadir di hadapan hakim bicara bagi pengurusan kes ('PK') dan mengeluarkan satu perintah 'kecuali' (unless) di mana jika defendan kedua gagal untuk hadir di hadapan hakim sebelum tarikh PK atau gagal pada tarikh tersebut, untuk mematuhi perintah yang diberikan pada mesyuarat PPPK terdahulu, penghakiman kemudiannya akan dimasukkan terhadap defendan kedua. Pada tarikh PK yang ditetapkan, peguam plaintif dan defendan pertama memberitahu hakim bahawa peguam defendan kedua akan lewat. Walaupun perkara tersebut ditangguh dengan masa yang munasabah, peguam defendan kedua gagal untuk hadir. Mahkamah membenarkan permohonan plaintif supaya penghakiman dimasukkan terhadap defendan kedua kerana kegagalan mematuhi perintah 'kecuali' (unless). Defendan kedua kemudiannya memohon untuk penghakiman diketepikan tetapi telah ditolak.

Diputuskan, menolak permohonan defendan kedua:

(1) Rujukan kepada perintah muktamad dalam menghadapi keingkaran berulangkali defendan kedua ke atas perintah-perintah mahkamah untuk memfailkan dokumen dalam persediaan untuk perbicaraan tidak dapat dielakkan dan adalah wajar. Defendan kedua telah melampaui batas apabila dia, tidak kurang daripada lima kali, berterusan dalam mengingkari perintah-perintah TR untuk memfailkan dokumen-dokumen (lihat perenggan 11).

(2) Ia akan menghalang tujuan keadilan jika defendan kedua dibenarkan untuk mengelak daripada akibat-akibat penghakiman yang dimasukkan terhadapnya. Kegagalannya untuk mematuhi bukan sesuatu yang di luar kawalannya (lihat perenggan 30).

(3) Defendan kedua merancang situasi tersebut. Ia dimulakan dengan desakannya ketika detik-detik penutup proses pra-perbicaraan, tanpa sebarang sebab sekalipun, untuk melantik peguamcara baru, dan, dengan itu, secara tidak munasabahnya menganggap dikecualikan daripada

mematuhi perintah mahkamah hingga mengarahkan peguamcaranya untuk tidak memfailkan dokumen-dokumen (lihat perenggan 30).

(4) Konsep atau ujian pembelaan ke atas merit-merit tidak berperanan di sini. Ujian yang terpakai adalah bagi pihak yang ingkar untuk menunjukkan kedua-dua bahawa tiada niat untuk mengabaikan atau melanggar perintah tersebut dan bahawa kegagalan untuk mematuhi adalah disebabkan oleh hal keadaan luaran (lihat perenggan 28).]

Notes

For cases on failure to comply, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8870–8872.

Cases referred to

Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23, FC (refd)

Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40, SC (refd)

Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 (folld)

Jokai Tea Holdings Ltd (Note), Re [1992] 1 WLR 1196, CA (folld)

Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd [2004] 4 MLJ 446, CA (refd)

Syed Mohamed Abdul Muthaliff & Anor v Arfan Bhisham Chotrani [1998] 3 SLR 964, HC (refd)

Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [1998] 4 MLJ 297, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 34 rr 3, 7

Thirunavakarasu (Sivaganam & Associates) for the plaintiff.
Duna Isa (Nik Dennis & Wong) for the second defendant

Supang Lian JC:

[1] At the third PTCM conference of this case on 18 January 2011, the deputy registrar made an order directing all parties to appear before me, as the trial judge, for case management (CM) on 28 February 2011 at 8.30am. In the meantime, the deputy registrar continued with further PTCM conferences. At the sixth PTCM on 25 February 2011, the deputy registrar made two orders. First, she directed that the plaintiff's application to consolidate this case with Civil Suit No MT2–22–259 of 2007, a case fixed for trial before Dato Abd Halim bin Aman J from 7–10 March 2011, be heard before me on 28 February 2011 at 8.30am, which is also the date fixed for the first case management (CM) before me. The second was an 'unless' order made under O 34 rr 3 and

7 of the Rules of the High Court 1980 to the effect that in the event the second defendant failed to attend before me on 28 February 2011 or by that date fails to comply with the orders of the court given at previous PTCM conferences directing the second defendant to file his bundle of documents, case summary, list of witnesses and witness statements, judgment may be entered against the second defendant.

[2] At 8.30am on the 28 February 2011 the court interpreter checked for the arrival of counsel for the parties in this case. Upon discovering that not all counsels have arrived, we stood down the case. The case was again called for hearing in chambers at 9.06am. Only counsels for the plaintiff and for the first defendant were in attendance. They informed me that counsel for the second defendant had texted to say that she was on the way to court. As we were running late and I had a trial actually scheduled for hearing at 9 the same morning, we could no longer wait for counsel's arrival. As such, I proceeded with the CM conference and hearing of the application of the plaintiffs' for consolidation. The first defendants' agreed with the consolidation and so did the second defendant as indicated in the letter of 18 February 2011 (exh IOI6) from the second defendant's solicitors to the plaintiff solicitors expressing agreement to consolidation. Given that n all parties agreed to the consolidation, I allowed the application. Thereafter, counsel for the plaintiff applied for judgment against the second defendant on grounds that the second defendant had not complied with the directions of the deputy registrar given under the 'unless' order of 25 February 2011. By then, it was nearly 9.27am and still there was no sign of counsel for the second defendant. In light that the second defendant had failed to file any of the documents and as such had disobeyed the 'unless' order of the court, I is entered judgment for the plaintiff against the second defendant with costs. Thereupon, the second defendant on 4 March 2011 filed an application to set aside that judgment. I heard the application on 29 March 2011. I refused to set aside the judgment and dismissed the application. The second defendant has since appealed against that decision and I now give my reasons.

[3] It is necessary to first ascertain the nature of the order of 25 February 2011 of the deputy registrar for it was pursuant to that order that I entered judgment against the second defendant. The exact terms are:

> Unless order issued pursuant to O 34 rr 3 and 7 of the RHC 1980 against the 2nd defendant. Judge may enter judgment in favour of the plaintiff against the 2nd defendant or strike out their counterclaim (if any) in the event the 2nd defendant fails to attend court for CM before the Judge on 28.2.2011 or if they fail to comply with the directions issued by the court.

Quite clearly, the order is a peremptory or an 'unless order'. The *Supreme Court Practice, Vol 1, 1997* p 462, 25/1/5 describes the 'unless' order thus:

> (A) peremptory order is one which makes clear to the other party, either from its terms or from the circumstances in which it was made, that exact compliance with no further argument is required by the court within a stated time, and indicating expressly or by implication that default will incur serious consequences. … The best practical form of peremptory order is the 'Unless Order'.

[4] It seems axiomatic that disobedience to a peremptory or 'unless' order of the court will ordinarily result in the court imposing the sanction either by dismissing the action or entering judgment against the party in default. Thus in *Re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196 at pp 1202–1203 Sir Browne-Wilkinson V-C, speaking of the 'unless' order, said:

> In my judgment, in cases where the court has to decide what are the consequences of a failure to comply with an 'unless order', the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

[5] The test for striking out the proceedings for failure to comply with an 'unless' order again came for consideration in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666. Ward LJ, after considering the long line of cases on the point including the case of *Jokai*, above, summarised the position thus at pp 1674–1675:

> (1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the

administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

[6] The *Jokai* case and *Hytec Information*, above, are regularly followed in our courts. I refer in particular to the judgment of the Court of Appeal in *Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd* [2004] 4 MLJ 446. There Nik Hashim JCA, as he then was, said at p 451:

> Order 34 r 7 provides for the discretionary power of the judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial case management conference. [14] Whilst it is true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at p 1674H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalising the defaulting party (see *In re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 (CA)).

[7] The pronouncements of high authority referred to above therefore make it clear that peremptory or 'unless' orders are only made by the court when the party in default has a history of failure to comply with previous court orders or a requirement of the rules. Since it is an order of last resort, it is axiomatic that if a party intentionally or deliberately flouts the order, he can expect no mercy. A sufficient exoneration will almost inevitably require that the party in default satisfies the court that something extraneous or beyond its control has caused its failure to comply. This can be expressed in the converse; that the burden is on the defaulter to explain and show that it had the intention to comply with the 'unless' order but something beyond his control prevented him from doing that. That is the point made by Kan Ting Chiu J in *Syed Mohamed Abdul Muthaliff & Anor v Arfan Bhisham Chotrani* [1998] 3 SLR 964 where he said at p 966:

> This can also be expressed in the converse, that a party must show that it had the intention to comply with the 'unless' order and was prevented against its intention from doing that. The burden is on the party to explain its failure to comply, as disobedience to a peremptory order would generally amount to contumelious conduct which will justify striking out a fresh action for the same cause of action — see *Tolly v Morris* [1979] 2 All ER 561 per Lord Diplock at p 571.

[8] In *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297 Haidar JCA expressed the same sentiments when he said at p 307:

> In this respect we can do no better than to quote the view of Ward LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at p 1875:
>
> The basis of the rule is that orders of the court must be observed and the court is entitled to expect its officers and counsel who appear before it to be more observant of that duty even than the litigant himself.
>
> It would then be for the defendant to explain or give reasons for her disobedience to the order of the court before the court could exercise its discretion.

[9] With these principles in mind, the question was whether there was a history of disobedience to the orders of the court on the part of the second defendant that led to the making of the 'unless' order. If so, whether the second defendant had sufficiently explained the failure to comply.

[10] On the first issue, I had no difficulty concluding that the second defendant had a history of failure to comply. For this, I need only to look into the chronology of events and the conduct of the parties, in particular, the second defendant, in the course of case management before the 'unless' order was made. The plaintiff had gone on oath (encl 97) to set forth the chronology of events. That outline of the chronology of events was largely undisputed by the second defendant and is to be taken as accepted. In addition, I referred to the notes of proceedings of the deputy registrar in the case docket, which I am entitled to take judicial notice. For ease of reference, I tabulate the chronology below:

Date	Coram	Event	Outcome
8 September 2010	Deputy Registrar	First pre-trial case management (PTCM)	The deputy registrar ('DR') ordered as follows: (1) Parties to file (i) Common bundle of documents (Part A, B & C) (ii) Statement of agreed facts (SOAF) (iii) Issues to be tried (iv) case summary of each party (v) List of witnesses (vi) Statements; and (2) Parties to appear for next PTCM on 8 November 2010 and are to be ready to fix the trial date.

8 November 2010	Deputy Registrar	Second PTCM	DR ordered as follows: (1)Parties to comply with the previous PTCM directions and to file (i) Bundle of pleadings (ii) Statement of agreed facts (iii) Issues to be tried (iv) Agreed bundle of documents (v) Each party's case summary (vi) List of witnesses (vii) Witness' statements; (2) In addition, parties to file separate bundle of documents; (3) Case is fixed for trial on 17, 18 and 24 March 2011 before the judge (MT3); and (4) Parties to appear for next PTCM before DR on 18 January 2011.
6 December 2010			The plaintiff filed the bundle of pleadings
10 December 2010			The plaintiff's solicitors forwarded plaintiff's bundle of documents to the first and second defendants for classification purposes. The plaintiff also requested for a copy of each of the defendant's bundle of documents for classification purposes. Note: To date the second defendant has yet to reply to this.
22 December 2010			The plaintiff's solicitors forwarded draft statement of agreed facts and draft issues to be tried to the first and second defendants. The plaintiff also filed its case summary and list of witnesses. Note: To date the second defendant has yet to respond to this.
11 January 2011			There being no response, the plaintiff filed the plaintiff's bundle of documents, statement of agreed facts and issues to be tried for court's reference.

18 January 2011	Deputy Registrar	Third PTCM	DR ordered: (1) Parties to comply with previous PTCM directions as to filing of documents; (2) to appear for next PTCM before DR on 14 February 2011; and (3) to appear for first case management (CM) before the judge on 28 February 2011 at 8.30am.
24 January 2011			The plaintiff filed amended statement of claim and served a copy of the same on second defendant's solicitors on 26 January 2011.
14 February 2011	Deputy Registrar	Fourth PTCM	The plaintiff has filed (i) plaintiff's case summary (ii) list of witnesses (iii) proposed SOAF (iv) issues to be tried (v) plaintiff's bundle of documents. The first and second defendants have yet to file any of the documents or bundles. DR ordered as follows (1) the first and second defendants to communicate with plaintiff in relation to the filing of statement of agreed facts, issues to be tried, and common bundle of documents by 21 February 2011; (2) the plaintiff to file new bundle of pleadings on or before 21 February 2011; and (3) the first and second defendants to file their respective case summary; list of witnesses and bundle of documents; and (4) parties to appear for next PTCM before DR on 21 February 2011.
17 February 2011			The plaintiff filed new bundle of pleadings

21 February 2011	Deputy Registrar	Fifth PTCM	Deputy registrar ordered: (1) The plaintiff to hand over directly the new bundle of pleadings; three copies of application for consolidation of case and the statement of agreed facts and issues to be tried regardless of any failure on the part of the second defendant to revert back with their response; (2) filing of second defendant's summary, list of witnesses, bundle of documents and (3) final PTCM before the deputy registrar on 25 February 2011.
25 February 2011	Deputy Registrar	Sixth PTCM	The plaintiff's counsel handed the new bundle of pleadings, the plaintiff's bundle of documents Vol 2, issues to be tried and statement of agreed facts directly to the deputy registrar. Still pending are the second defendant's bundle of documents, case summary, list of witnesses, witness statements of all parties. The DR ordered as follows: (1) the plaintiff's and the first defendant's solicitors are to write to the solicitors for the second defendant to inform them that the second defendant must comply strictly with the directions of the court at previous PTCM conferences to file the second defendant's bundle of documents, witness statements, list of witnesses and case summary and (2) In the event the second defendant fails to attend court for CM before the judge on 28 February 2011 or fails to file the second defendant's documents as previously ordered by the court on or before 28 February 2011 judgment may be entered against the second defendant pursuant to O 34 rr 3 and 7 of the RHC 1980.

25 February 2011			The plaintiff's and the first defendant's solicitors each served letters on the second defendant's solicitors to inform them of the order of the deputy registrar.
28 February 2011	Judge	First case management	The second defendant did not comply with the orders of the deputy registrar and did not appear. Judgment entered against the second defendant with costs.

[11] As can be seen from the chronology the deputy registrar as far back as 8 September 2010 directed the parties to file the common bundle of documents, the SOAF, issues to be tried, case summary of each party, list of witnesses, and witness statements. Apparently, none of the parties complied or took steps to obey the directions. This prompted the DR to make a further order at the second PTCM for the parties to comply with the court order. In addition, the DR ordered the parties to file the bundle of pleadings and separate bundle of documents as well as setting down the case for trial. By the time of the third PTCM the plaintiff had taken action to comply with the directions whereas the first and the second defendants had not. The DR was to repeat the same order at the third, fourth and fifth PTCM. The first defendant had only complied by the time of the fifth PTCM whereas the second defendant did nothing at all to comply. By the time of the sixth PTCM the second defendant had still done nothing to comply. It was then that the DR finally is gave the 'unless' order. In my judgment, resort to the peremptory order in the face of the repeated disobedience of the second defendant to the court orders to file the documents in preparation for trial, was inevitable and well is justified. The second defendant, in my judgment, had pushed it to the limit when he no less than five times persisted in disobeying the orders of the DR to file the documents.

[12] Furthermore, by the time of the sixth PTCM on 25 February 2011, the date of trial loomed large being only less than three weeks away and the first CM before the judge only three days ahead. In my judgment, the second defendant having flouted and ignored the orders repeatedly gave the deputy registrar no other option but recourse to the peremptory order. The peremptory order gave the second defendant his last chance to put his case in order by 28 February 2011. Unfortunately, when 28 February 2011 came there still was no compliance. Worse, the second defendant did not make any appearance on 28 February 2011. In light that the second defendant did not bother to remedy his default at the last chance given, there could be no other answer to such contumelious conduct but to impose the sanction.

[13] I turn now to the second question, whether the second defendant had satisfied the court that something extraneous or beyond his control has prevented him from complying with the 'unless' order.

[14] The application to set aside judgment (encl 96) was filed by the new solicitors acting for the second defendant namely, Messrs Dennis Nik & Wong, on 4 March 2011. The second defendant had filed altogether four affidavits in support of the application whereas the plaintiff had filed two in opposition. In his submission, learned counsel for the second defendant gave five reasons for moving the court to set aside the judgment.

[15] Firstly, sometime in February of 2011 the second defendant due to 'unforeseen circumstances' decided to appoint Messrs CM Yeo & Associates to take over the conduct of this case from Messrs Yoong & Partners, the solicitors then acting for him in this action. The second defendant had informed Messrs Yoong & Partners of this and the latter through counsel for the first defendant had informed the deputy registrar at the n PTCM on 21 February 2011 (the fifth PTCM). Messrs Yoong & Partners were unable to proceed with filing the documents as ordered by the deputy registrar because the second defendant had instructed them that he was in the process of appointing the new solicitors and any further documents were to is be filed by the latter. Sometime in February 2011, Messrs CM Yeo & Partners had informed the second defendant that they were unable to represent him as the solicitor in charge was unable to attend court on the days fixed is for trial ie 17, 18 and 24 March 2011. The second defendant had since attempted numerous times to appoint new solicitors to represent him but was unsuccessful due to the time factor.

[16] Secondly, the plaintiff and the first defendant themselves had only complied with the courts directions with regard the filing of all required documents on 25 February 2011 and as such, were themselves not beyond reproach. The second defendant referred to *Md Amin*'s case, where the Court of Appeal found that the learned judge in that case had overlooked the fact that the respondent too was not free from fault in that it also failed to comply with one of the court's directions. It was held that since the respondent and the appellants were equally at fault there was no reason to be harsher towards the appellants than the respondent.

[17] Thirdly, when giving the 'unless' order of 25 February 2011 the deputy registrar had directed the plaintiff's and the first defendant's solicitors to inform the second defendant's solicitors of the order and the directions given. Messrs Yoong & Partners had only received the letter from the first defendant's solicitors at 3.06pm on 25 February 2011 which is a Friday and from the plaintiff solicitors at 5.06pm the same day. Messrs Yoong & Partners however were unable to contact the second defendant for instructions. At the same time,

due to the short notice, it was impossible for Messrs Yoong & Partners to comply with the court order. The second defendant in his affidavit claimed that had he known of the order, he would have personally attended court on 28 February 2011 to explain the situation.

[18] Fourthly, Miss Tan Kay Yee of counsel for the second defendant from Messrs Yoong & Partners had on the morning of 28 February 2011 actually arrived for the hearing of the case but that was after the plaintiff and the first defendant's solicitors had entered the judge's chambers. She decided to wait outside and did not enter as she thought it inappropriate to interrupt the proceedings. She was surprised upon being told by counsel for the plaintiff that judgment was entered against the second defendant.

[19] Finally, the second defendant contended that as he has a defence on the merits that could only be proved at a full trial of the action, the application to set aside judgment must be allowed.

[20] It seems to me that the first point raised is the mainspring behind the second defendant's disobedience of the court orders. The question is whether it is something that was extraneous or beyond his control? I did not think. The reasons are these. Since the order first went out on 8 September 2010 for the parties to file the bundles and documents to the month of February of 2011, five months have come and gone, and the second defendant did nothing to comply. Then in February of 2011, we have it that the second defendant suddenly decided to appoint new solicitors, namely, Messrs CM Yeo & Associates. As it is, the second defendant would not disclose the exact date in February when that decision was made. Neither did he disclose the date when Messrs Yoong & Partners were informed and the exact date when Messrs CM Yeo & Partners turned around to say that they could not accept the appointment. For all three events, the second defendant would only say it was 'sometime in February'. What was worse, the second defendant did not disclose the reasons for wanting to change solicitors in February preferring to merely state that there were 'unforeseen circumstances'. It seems to me therefore that not only was there a withholding of the reasons for wanting to change solicitors, there also was a contrived vagueness on the dates these critical decisions were made. The only date disclosed was the day of the PTCM on 21 February 2011 when counsel for the first defendant, mentioning on behalf of Messrs Yoong & Partners for the second defendant, had informed the deputy registrar of the intention to appoint new solicitors. There was nothing redeeming about disclosing this date considering that it would have been a fact within the knowledge of the court in any event. Furthermore, the bare fact of informing the deputy registrar was not in itself exculpatory.

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[22] What is more, one cannot help but wonder why, even if the second defendant had wanted to appoint new solicitors, albeit late, Messrs Yoong & Partners who were still on record the solicitors acting for the second defendant could not have filed the documents. They have not been discharged and there was no application made for them to be discharged. There was no notice of change of solicitors either. The trial date was approaching and the deputy registrar had repeated the orders to file the documents in preparation for trial more than enough. In such circumstances and notwithstanding the intention to appoint new solicitors, Messrs Yoong & Partners who were the solicitors on record should have filed the documents. When pressed to explain, the second defendant by the further affidavits filed in support of the application proffered that Messrs Yoong & Partners did not do so because he had instructed them that he was in the process of appointing the new solicitors and any further documents were to be filed by the latter. In my judgment, in giving such instructions to Messrs Yoong & Partners not to file the documents, the second defendant had shown blatant indifference and disdain for the orders of the deputy registrar. It must be emphasised that the engagement of the new solicitors at that stage was not even a sure thing. How else could one view such instructions of the second defendant but that it signifies an intention to ignore and flout the court orders. Messrs Yoong & Partners also paid scant regard to

the orders of the court. They were apprised of the court orders and very well knew that the instructions of the second defendant not to file the documents were contrary to and flouts the court orders. The fact that they chose to obey the contrary instructions of the second defendant is an indication of their utter disregard of the courts orders. Ergo, one cannot be under any illusion that the situation that the second defendant found himself was something that was beyond his control.

[23] On the second point, the short answer to this is that, unlike the respondent in *Md Amin*'s case who failed to comply with one of the court directions, the plaintiff in our present case, as the second defendant himself highlighted, had at the time the 'unless' order was made fully complied with all the directions of the court by 25 February 2011. It was only after full compliance by the plaintiff and the first defendant that the 'unless' order was made. Hence, there was no question of the plaintiff being also at fault. In any event, as clearly borne out by the chronology of events, the inability of the plaintiff to comply on time with the court orders was largely due to the non-cooperation of the second defendant in settling the documents and agreed facts and issues to be tried. On 12 December 2010, the plaintiff in trying to settle the common bundle of documents extended its documents to the second defendant for classification purposes and invited the latter to do likewise. The second defendant never responded to this. On 22 December 2010, the plaintiff forwarded the draft statement of agreed facts and issues to be tried to the second defendant. Again, there was no response. In fact, the second defendant all along had ignored the overtures of the plaintiff to settle the documents, agreed facts and issues to be tried to the point that it was causing delays in complying with the court directions and no doubt added to the wasted costs. The deputy registrar in the end had to change course and ordered the parties to file their own bundle of documents and allowed n the plaintiff to submit the SOAF and issues without further consultation with the second defendant. In such circumstances, the second defendant's resort to the principle laid down in *Md Amin*'s case was misplaced.

[24] With regard the third point, to my mind, nothing could be further from the truth than saying that the second defendant was given very short notice to comply with the 'unless' order. This is because the second defendant right up to 25 February 2011 had been carrying on in defiance of the court orders having done nothing to comply. As such, the 'unless' order of 25 February 2011 was the final of the many extensions of time given to the second defendant to remedy an already dire situation brought about by his indolence. The court was saying that the second defendant had played around far too long and enough is enough. Thus, in the circumstances of this case, what appeared to be a short time period to comply with the 'unless' order, in truth, was not so. In my judgment, even if this final extension was short, it would not have served the

ends of justice to avail the second defendant of the benefit of a situation engendered by his own prolonged and contumacious disregard of the court orders.

[25] In any event, Messrs Yoong & Partners received the letter by 3.06pm on Friday 25 February. They therefore knew that time was short and should have acted immediately to compile the bundles and documents so they could at least have them ready for submission to the court on Monday the 28th. Instead, they wanted to revert to the second defendant for instructions which, to my mind made no sense considering that they knew all along that the second defendant's instruction was not to file any document. The fact of the matter is that they did nothing at all to comply and had no intention to. This is borne out by the fact that when counsel then acting for the second defendant attended court, albeit late, on the 28th it is not in dispute that she came bare handed with nothing in hand to show compliance or at the very least some attempts to comply. As for the second defendant saying that he would have attended court on 28 February to explain the situation had he known of the 'unless' order, what good would it have done if he had merely wanted to explain what was already an unacceptable situation. It is noteworthy that the second defendant had merely wanted to explain the situation rather than that he would have instructed the solicitors to comply with the 'unless' order had he known. This underscores his true position that even if he had known of the 'unless' order he nonetheless had no intention of complying with it.

[26] On the fourth point, I wish to state that neither the court interpreter, nor I or counsels that attended were aware that Miss Tan Kay Yee had arrived and had sat outside the chambers. Besides, she did not approach me or the court interpreter after the proceedings had ended. Whatever might have been the case, the non-attendance or late attendance of counsel on the 28 February 2011 in any event was not the reason judgment was entered. In truth, judgment was entered because of the non-compliance with the 'unless' order to file the documents in preparation for trial.

[27] Finally, with regard the second defendant's reliance on defence on merits, I think it is misplaced. With respect, I think that the second defendant has confused the test applicable to judgments entered in default of appearance for the test applicable to judgments meted out for disobedience to the peremptory or 'unless' orders of the court. The test of defence on merits comes into operation when the court exercises discretion to set aside a judgment entered in default of appearance of the defendant. It is well settled that if the judgment in default of appearance is regular, the discretion to set it aside will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits (see *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 at p 41; *Bank Bumiputra Malaysia Bhd v Majlis*

Amanah Ra'ayat [1979] 1 MLJ 23). The onus therefore is on the party in default to come up with an affidavit showing merits.

[28] Our present case, however, is not one where judgment had been entered in default of appearance of the second defendant. Rather, it was the enforcement of the sanction for the failure to comply with the peremptory order of the court after repeated extensions of time. The authorities are clear that the test applicable is that the defaulting party demonstrates both that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances. The concept or test of defence on merits does not come into play. In fact, it does not feature at all in the discourse of Ward LJ in *Hytec*'s case, who had considered the long line of established cases on the point.

[29] In any event, the second defendant had not in any of the affidavit supporting the application to set aside, set forth the facts showing a defence on merits. No doubt, counsel for the second defendant had spoken at length on the merits of the defence during arguments but that in my opinion was tantamount to making a statement from the bar. That counted for nothing. Hence, even if defence on merits were a factor, it still did not avail the second defendant much because there is no affidavit in support disclosing facts showing defence on merits.

CONCLUSION

[30] In my judgment it would in the circumstances of this case defeat the cause of justice if the second defendant had been allowed to escape the consequences of judgment given against him. This is because the facts is and circumstances in this case revealed that the failure to comply on the part of the second defendant was not something that was beyond his control. Rather, it was brought about by his insistence in the closing moments of the pre-trial process for no reason whatsoever to appoint new solicitors and by that had unreasonably presumed to be excused from complying with the court orders to the extent of instructing his solicitors not to file the documents. The second defendant in other words had contrived the situation and having done that was determined to have his cake and eat it. I could not have allowed that for it would encourage others who have not troubled to comply with the peremptory orders of the court to apply to set aside judgments in default on the notion that the courts will readily condone or overlook such breach.

Second defendant application dismissed.

Reported by Ashok Kumar